United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4049, 4061, 4074

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

ITT WORLD COMMUNICATIONS INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
and WESTERN UNION INTERNATIONAL, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

—and—

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
XEROX CORPORATION,
HAWAIIAN TELEPHONE COMPANY,
AMERICAN PETROLEUM INSTITUTE,
Intervenors.

PETITION FOR REVIEW OF A REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

B
P/S

BRIEF OF PETITIONER RCA GLOBAL COMMUNICATIONS, INC.

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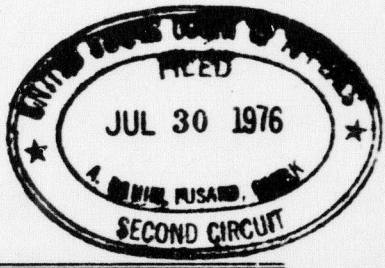

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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BRIEF OF PETITIONER RCA GLOBAL COMMUNICATIONS, INC.

Petitioner RCA GLOBAL COMMUNICATIONS, INC. ("RCA Globcom") submits this brief in support of its Petition asking the Court to review and set aside a Report and Order (JA 1-9) released by the Federal Communications Commission ("FCC") in its Docket No. 19558 on January 19, 1976 and published at 57 F.C.C.2d 705 (1976).* RCA

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* The Commission filed the record below by submitting, pursuant to FED.R.APP.P. 17(b), a certified list of the documents constituting that record. The parties have reproduced the entire record in their separately bound Joint Appendix. Pages of that document are cited as "JA #". The Commission's Report and

Globcom and the other petitioners are the country's three principal common carriers of overseas record (*i.e.*, non-voice) communications and of private line channels for voice/data communications.

The Order abruptly reversed FCC policy by holding that it is in the public interest to allow Intervenor American Telephone & Telegraph Company ("AT&T"), dominant proprietor of the nation's domestic public message telephone service ("MTS"), to use its overseas telephone system to transmit record communications to foreign points. It did so notwithstanding the readiness, willingness and ability of petitioners, who have traditionally supplied the nation's overseas record communications services on a competitive basis, to furnish, on equal or better terms, all of the public's needs for overseas record services, including record services which originate or terminate on the domestic MTS system (JA 97-102, 115, 120, 127, 131, 179-84, 201-03, 207-21, 227-28, 296, 300-02, 342-44, 367-69, 388).

This sweeping fiat was announced by the FCC in a perfunctory nine-page opinion, entered without benefit of an evidentiary hearing and on the sole basis of written comments solicited by the Commission in 1972 and received in early 1973. In so doing, the Commission reversed long-standing policy limiting AT&T's role in overseas telecommunications to the provision of essentially voice services. (JA 90-91, 176-78, 193-97, 246, 262-67) The Order would permit exploitation by AT&T of the extraordinary marketing advantages afforded by its domestic MTS monopoly to transmit record traffic through its overseas telephone system (JA 85-86, 88-89, 198-99, 293, 373-76). It

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Order is the first item in the Joint Appendix and appears at JA 1-9. The Joint Appendix also includes, at the request of Intervenor American Telephone & Telegraph Company, a letter from Intervenor Xerox Corporation to the Commission dated June 17, 1971 (JA 442-44), which was a factor in the Commission's decision to initiate this Docket (JA 10).

thus lays the foundation for AT&T to extend its monopoly power to overseas record services, a market traditionally served by the far smaller and competitive petitioners, creating the threat of a profound upheaval, to the public's detriment, in the structure of the industry serving America's needs for overseas record communications (JA 84-86, 92-93, 130, 188-92, 197-201, 229-30, 267-70, 293-94, 337-38, 341-42).

RCA Globcom and the other petitioners, ITT WORLD COMMUNICATIONS INC. ("ITT Worldcom") and WESTERN UNION INTERNATIONAL, INC. ("WUI"), each maintains its principal office in Manhattan, and their Petitions are before this Court pursuant to Communications Act § 402(a), 47 U.S.C. § 402(a) (1970), and 28 U.S.C. §§ 2341-2353 (1970), *as amended,* (Supp. IV, 1974).

Issues Presented for Review

1. Is the Commission's Order authorizing AT&T to use its overseas message telephone system to transmit record traffic subject to reversal by reason of the Commission's failure to comprehend and properly consider the petitioners' proposals for providing similar services to the public?

2. Is the Commission's Order subject to reversal by reason of its arbitrary and capricious departure from its established policy limiting AT&T's role in overseas telecommunications to its traditional voice-only service?

3. Is the Commission's Order subject to reversal by reason of the Commission's failure to consider antitrust policies before authorizing the extension of AT&T's monopoly power into the overseas record market?

4. Is the Commission's Order subject to reversal by reason of the Commission's failure to conduct a hearing

adequate for the importance and complexity of the issues presented below?

We submit that the answer to each of these questions is "yes".

Statutes Involved

The provisions of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (1970), *as amended,* (Supp. IV, 1974 and Pub. L. No. 94-192 (Dec. 31, 1975)), and of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (1970), *as amended,* (Supp. IV, 1974 and Pub. L. No. 94-183, § 2(2) (Dec. 31, 1975)), cited in this brief, are reproduced in full text in an appendix at the back of this volume.

STATEMENT OF THE CASE

A. *Basic Issue in Controversy*

The Commission initiated the Docket below by a Notice of Inquiry, 36 F.C.C.2d 605, 37 FED. REG. 16042 (1972) (JA 10-16), released in July 1972. Its purpose was to determine whether, and by which carriers, the developing capability of domestic telephone subscribers to originate (and receive) data, facsimile and other record calls* should be extended to permit them to communicate conveniently in the record mode with overseas points.

Having found that a public need exists for this service, a finding which is not in dispute here, the principal question before the Commission was whether the petitioners or AT&T should provide the overseas facilities for the trans-

* AT&T and its affiliated local telephone companies provide to subscribers of the domestic MTS a service known by AT&T's registered service mark of "DATA-PHONE". A subscriber who attaches an appropriate device to the end of his telephone line may call up another domestic telephone subscriber so equipped. And, in lieu of or in addition to conventional voice messages, they may exchange data, facsimile and other record communications.

mission of record calls originating on the domestic MTS from the continental United States to overseas points. The Commission, reversing its long-standing exclusion of AT&T from the provision of overseas record services, opted to allow AT&T direct entry into the competitive record market served by the far smaller petitioners.

Petitioners submit that this decision is, for several reasons which this brief documents, arbitrary and capricious, and thus subject to reversal. The Commission's ultimate decision, and much of its supporting analysis, rest on a fundamental misconception—a failure to comprehend that the petitioners offered to provide to domestic telephone subscribers an overseas record capability comparable in all respects (and better in some) than that proposed by AT&T.

Although the Commission's Report refers to the new communications capability in issue as "overseas 'data-phone-type services'" (JA 1), DATA-PHONE is *not* a term which describes a generic service available only from, or only properly from, a telephone company. Rather, it is a trade name for AT&T's brand of record transmission through its domestic circuits. The generic capability of transmitting facsimile and cognate record matter is available from petitioners and anyone else with appropriate circuits.

Indeed, RCA Globcom and the other petitioners (known in industry parlance and identified in the Report below as "international record carriers" or "IRCs") now offer an existing service under the tradename "DATEL" which provides for the overseas transmission of data, facsimile, and like matter on a "per-call" basis (*i.e.*, similarly to a telephone call). (JA 94-95, 204-06, 245) AT&T's message telephone system, the DATEL services of the IRCs, and the private line voice/data services of the IRCs all involve the use of analog circuits of a "band width" (a measure of capability to carry a range of electromagnetic frequen-

cies) sufficient to transmit human speech (*see* JA 105, 110-11, 171, 339), and, at high speeds, information expressed in record forms (*see* JA 18-19; *see also* J. MARTIN, INTRODUCTION TO TELEPROCESSING, at 23-27 (1972)).*

Although the Commission received comments from equipment manufacturers and others with peripheral interest in the matters in controversy, the principal protagonists, were—and are—the petitioning IRCs and AT&T.** The IRCs asked the Commission to make a full overseas record transmission capability available to domestic telephone subscribers by requiring AT&T to provide effective interconnections (see Communications Act § 201, 47 U.S.C. § 201 (1970)), at New York and other appropriate points, between the domestic MTS system and the IRCs' overseas circuits.*** (JA 97-99, 102, 116-18, 207-10, 221, 250, 273-75,

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* The telephone handset is, functionally, a device which converts speech or other audible sound into a range of frequencies in the electromagnetic spectrum for transmission through an analog circuit of appropriate "band width" and which, reciprocally, reconverts a range of incoming electromagnetic frequencies into sound. As noted in the text above, other devices, known generically as "modems" (for "modulator—demodulator"), also can be attached to the end of a line to make comparable "translations" between the electromagnetic frequencies carried by analog circuits and information expressed in modes other than sound (*e.g.*, the output of a computer or a printed page to be "copied" by facsimile techniques). Contemporary technology also has provided a variety of acoustical devices which may be affixed to a conventional telephone handset and which convert data in record form into sounds which then become the input to the communications circuit. (JA 19) Many office "telecopiers", including models manufactured by Intervenor Xerox Corporation, are instruments of the acoustical type. (JA 19, 255)

** AT&T also represents, broadly speaking, the interests of the many local telephone companies around the country whose unique, Government-franchised networks of wires reach into virtually every building in the United States and whose circuits are integrated to form the domestic MTS system.

*** As will be explained later (see pp. 9-10, 12, *infra*), such an arrangement (*i.e.*, the supplying of specialized services by means of interconnections with AT&T) is the manner in which other inter-

388-89) The IRCs' networks are competitive *inter sese.* (JA 120, 127, 181)

The IRCs urged the Commission to adhere to its long-standing policy of limiting AT&T's use of the overseas MTS system to voice traffic. (JA 90-93, 177-79, 193-98, 246) They pointed out that AT&T's use of its overseas telephone system to transmit record traffic originating on the domestic MTS system could have a devastating effect on the IRCs' capacity to provide other record services (JA 86, 92, 130, 188, 229-30, 335-38) and would supply no services to the public which could not be made available through interconnection of AT&T's domestic telephone circuits with the overseas circuits of the IRCs (JA 296, 344, 388). AT&T, on the other hand, successfully demanded that the Commission discard its established policy and authorize AT&T, for the first time, to transmit record transmissions through the circuits of its overseas message telephone monopoly. (JA 151-53)

The carriers' differences as to these matters before the Commission concerned AT&T's marketing dominance, the effect of its further expansion on the economic viability of the existing services of the record carriers, and issues of legal and regulatory propriety. Nothing in the Commission's Report, or in the record below, suggests that the Commission rejected the IRCs' interconnection proposals, or should have done so, by reason of their technical unfeasibility. All fall well within the limits of contemporary communications technology (JA 97-99, 116-18, 201-03, 207-10, 300-01, 332, 338-40, 343) which AT&T, for commercial reasons, resists applying (JA 95-96, 204-05, 397-99, 410-13, 437).

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national telecommunications services are now offered on a "through" basis by interconnections with domestic carriers. Indeed, AT&T conceded in its comments below that should the IRCs be authorized to provide the overseas channels for the services at issue, they would do so through an "arrangement to connect those channels with the public switched [telephone] network." (JA 162)

B. *The Contending Carriers*

1. Petitioners' Services to the Public

Each of the petitioning carriers now provides a full range of record communications services between the continental United States and overseas points,* including conventional overseas telegrams ("cables"), the "switched" record services of telex (a switched teleprinter service) and DATEL, and private (leased) line services for data and alternate voice/data ("AVD") use.** (JA 1) The petitioning IRCs also supply facilities for overseas television transmission and reception.*** All of these services employ the same type of broadband analog circuits required for the services at issue herein. Such circuits when used for telegrams, telex and private line teleprinter channels ("narrowband services") are subdivided by various techniques (collectively referred to as "multiplexing") into a number of circuits of narrower band width which are capable of handling transmissions at teletype speed; AVD service and DATEL, on the other hand, employ the full cir-

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* "Overseas points" refers to all foreign countries (except Canada), Hawaii, Puerto Rico, Guam, and the Virgin Islands. See 47 C.F.R. § 43.61(a)(1) (1975).

** A "switched" telecommunications system (*e.g.*, the telex service of the IRCs and the domestic MTS, is one in which subscribers are interconnected by means of common exchanges, enabling any subscriber to communicate with any other subscriber. A "private line" refers to a circuit connecting two or more points which a carrier leases or otherwise dedicates to a particular customer for its full-time use. See 47 C.F.R. § 43.61(a)(6) (1975). Private line services have their principal utility for customers with high-volume communications needs between fixed locations. (JA 75-77)

*** Television program transmission is provided internationally on an alternating basis by the petitioners and AT&T, with each of the petitioners and AT&T providing such service every fourth week. Such service is provided on an interconnected basis with AT&T and other domestic carriers. *See STA for TV Service via Satellite*, 1 F.C.C.2d 82, *amended*, 1 F.C.C.2d 415 (1965), *modified*, 18 F.C.C.2d 402 (1969), *modified*, 20 F.C.C.2d 965 (1970).

cuit band width.* The private line AVD customer may use his AVD circuit to send and receive speech and a variety of record communications, depending on his choice of end-line attachments. DATEL may also be used for the transmission of a variety of record communications, including facsimile. The Commission, however, restricts voice use of DATEL to "cue and contact" purposes, *i.e.*, to such voice communication as may be necessary to initiate and coordinate the record transmission.**

In *American Tel. & Tel. Co.*, 37 F.C.C. 1151 (1964) (the *"TAT-4"* Decision),*** the Commission ruled that the IRCs should provide AVD service which, like the service in issue in this proceeding, is a mixture of voice and record, from the United States to overseas points and that, except for certain circuitry then used by the Department of Defense, AT&T should be excluded from its provision. (We develop at some length hereafter (see pp. 29-36, *infra*) the significance of this decision and the error of the Commission's attempted repudiation, in this proceeding, of the economic and legal analysis which sustains it.)

Unlike AT&T's nation-wide operation, the IRCs' direct receipt of traffic from customers in the continental United

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*During the time of the proceedings below, the petitioning carriers' DATEL service offerings provided for transmission speeds of up to 1200 bps, or approximately 25 times the speed of telex. (JA 1, 95) An analog circuit's band width establishes the maximum limit for the circuit's data transmission rate. Whether or not that speed can be obtained in a given case depends upon the characteristics of the modems used and other factors.

**A limited exception to this policy exists in the case of DATEL service between the Pacific Coast and Hawaii. The Commission has authorized unrestricted voice transmissions on these circuits. See *ITT World Communications Inc.*, 2 F.C.C.2d 573 (1966).

***"TAT" is an acronym for "trans-Atlantic telephone cable". The Commission rendered its so-called *TAT-4* Decision in the course of proceedings convened to rule upon proposals of AT&T and the IRCs with respect to the route of, and their concurrent use and joint financing of, a then-proposed fourth telephone cable from the East Coast of the United States to Europe.

States and direct delivery of traffic to such customers is restricted at present by the Commission to certain "gateway cities"—*viz.* New York, Washington, San Francisco, Miami and New Orleans.* Deliveries of overseas traffic to and from the rest of the country (the so-called "hinterland") must be made by interconnection between the circuits of the IRCs and those of domestic carriers, chiefly The Western Union Telegraph Company and, on a considerably more restricted basis, telephone carriers. The IRCs also obtain their connections to subscribers' offices in the gateways from the local telephone company.**

Each of the IRCs transmits and receives foreign traffic over circuits authorized by the FCC, see Communications Act § 214, 47 U.S.C. § 214 (1970), *as amended,* (Supp. IV, 1974), which it establishes and maintains jointly with the appropriate "administration", *i.e.*, a telecommunications operating authority, in the country at the other end of the circuit.***

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* In addition to the petitioners, the United States is served by three smaller IRCs—TRT Telecommunications Corporation, the former Tropical Radio & Telegraph Company, with the same "gateways" as the petitioners, The French Telegraph Cable Company, with a "gateway" in New York, and the United States-Liberia Radio Corporation, a subsidiary of the Firestone Tire & Rubber Company, which operates between Akron, Ohio and Monrovia. Comments of TRT appear at JA 175-84 and 367-70.

** The typical "gateway" subscriber accesses the IRC's message center by means of a tieline supplied to the IRC on a lease basis by the local telephone company. The latter is the entity which, in most urban areas, is franchised, directly or through a subsidiary, to maintain and operate the subterranean conduitry required for the circuits of both the telephone system and other communications services. (JA 417) *See ITT World Communications, Inc.* v. *New York Telephone Co.*, 381 F.Supp. 113, 115 (S.D.N.Y. 1974).

*** The foreign administrations, usually governmental entities (*e.g.*, the British Post Office), collect outgoing traffic and distribute incoming traffic within their own countries. (In similar fashion, AT&T jointly maintains with the same foreign administrations the overseas telephone system by which links are provided between

The IRCs' switched overseas record services have included, since about 1950, telex (JA 1) and, since RCA Globcom's pioneering efforts in 1964, DATEL (JA 204). Telex subscribers are supplied with a teleprinter and the capacity to call up (by dialing procedures analogous to those of the telephone system), or to be called up by, subscribers to the comparable systems of foreign administrations around the world; once connected, the teleprinters can exchange written traffic. Each of the petitioners has its own telex subscribers in the "gateway cities" *; each of the IRCs also interfaces its network of overseas circuits with the domestic circuitry of Western Union so as to provide overseas access, on similar terms, for the 106,000 subscribers of Western Union's teleprinter exchange services.** Telex circuits have a relatively low informa-

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the AT&T MTS system in the United States and the domestic systems of overseas nations.)

The overseas circuits of both the IRCs and AT&T are provided through various submarine cables which they have financed jointly and use concurrently, *see, e.g., American Telephone & Telegraph Co.*, 35 F.C.C.2d 801, 822-23 (1972), *amended*, 39 F.C.C.2d 865, *amended*, 40 F.C.C.2d 913 (1973), and, in recent years, through the international communications satellites of the INTELSAT system made available to all the U.S. carriers by the Communications Satellite Corporation (JA 227-28). *See Oversea Communications*, 30 F.C.C.2d 571 (1971). Each of the petitioners maintains competing direct circuits to virtually every major country overseas, and each can reach, directly or through foreign forwarding carriers, almost any point on earth.

* As of December 31, 1974, RCA Globcom had 5,379 such subscribers, ITT Worldcom had 5,695, and WUI had 3,078. FEDERAL COMMUNICATIONS COMMISSION, STATISTICS OF COMMUNICATIONS COMMON CARRIERS: YEAR ENDED DECEMBER 31, 1974 [hereinafter cited as "FCC, 1974 STATISTICS"], at pp. 194, 201 (1975).

** As of March 31, 1976. Source: Final Prospectus (at p. 11) of The Western Union Corporation, dated June 29, 1976, contained in Amendment No. 1 to Registration Statement No. 2-56510 filed with the Securities and Exchange Commission. Western Union operates two functionally integrated, but mechanically separate, domestic teleprinter exchange systems—one known by the tradename "TELEX", which Western Union developed itself, and another, known by the tradename "TWX". which it acquired from AT&T

tion capacity—some 66 words per minute, which represents, in the binary form of contemporary information theory, about 50 "bits" per second ("bps").

The institutional features of the DATEL services substantially parallel those of the telex service. The IRCs provide the circuit links between this country and the overseas operating entities.* A customer in this country can access the IRCs' DATEL circuits by a direct tieline connection to an IRC's message center (an option which, in general, is only practical for customers in the "gateway cities"), by placing a call through Western Union's domestic Broadband Exchange System ("BEX") or by a telephone call through the MTS. (JA 94-96, 204) The BEX system, however, serves only a few cities. With respect to access from the MTS, AT&T refused until 1972, *any* electrical interconnection whatsoever between its MTS and the IRCs' data transmission facilities (JA 410). Since that time, the electrical interconnection which has been in effect merely provides to the IRCs the type of connection to the MTS system enjoyed by any private AT&T customer, rather than an appropriate inter-carrier connection. This inadequate interconnection results in an extensive amount of manual traffic handling for the IRCs and attendant delay for their customers.

DATEL has had a limited commercial acceptance to date (JA 7), largely because of the difficulties, created in significant measure by AT&T, in gaining convenient access

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in 1971. *See Western Union Telegraph Co.*, 24 F.C.C.2d 664 (1970). The IRCs' systems interconnect with both of these domestic networks (JA 173) and were interconnected with the TWX system during its ownership by AT&T, *see American Tel. & Tel. Co.*, 19 F.C.C.2d 711, 714-15 (1969).

* RCA Globcom provides DATEL service to Hawaii, Puerto Rico and eleven other countries overseas. See RCA Global Communications, Inc., F.C.C. Tariff No. 79. Similarly, ITT is tariffed to provide DATEL service to eleven countries (as well as to Hawaii and Puerto Rico). (JA 94) WUI is tariffed to provide DATEL service to twelve countries.

to the IRCs' overseas circuits. (JA 95-97, 204-05, 410-12) Indeed, it is ironic that AT&T, having thus impeded the development of the IRCs' DATEL services by denying adequate interconnection with the domestic MTS system, should now point to their currently limited scope as a reason for allowing AT&T to make record transmissions through its overseas MTS system. The growth of DATEL service also has been slowed by the relative dearth, until the last few years, of potential recipients of data traffic abroad. (JA 204-05) Usage is, however, growing, and assuming that improved interconnection with the domestic MTS system can be secured, DATEL is capable of almost indefinite expansion. (JA 96-97, 338)

2. The Relevant Services of AT&T

AT&T is, beyond all else, the central element in the nation's public message telephone system which reaches some 149,008,000 telephones around the country (as of December 31, 1975, see American Tel. & Tel. Co., Bell System Statistical Manual 1950-1975, May, 1976, [hereinafter "Bell System"], at 504). AT&T and its affiliated local telephone companies are authorized to use the circuits of the domestic MTS system primarily for voice communications. (JA 1) Under the cachet of "DATA-PHONE", the MTS system is also used for the transmission of computer data, facsimile, and other record matter between domestic points. (JA 144) Prior to the Commission's ruling in this proceeding, however, the FCC had restricted AT&T's use of its overseas telephone system to voice traffic only, on the grounds that AT&T's enrty into the overseas record field would have a devastating effect on the competitive businesses of the far smaller IRCs. (JA 193-97) The Commission also licenses AT&T to supply private line voice and, as noted above, television program transmission services overseas. (JA 1)

3. The Market Involved

By any measure, AT&T ranks among the world's largest commercial organizations. Most of its consolidated revenues (over $28.9 billion in 1975, see Bell System, at 102) arise from, and most of its $87.2 billion capital plant (as of December 31, 1975, *id.* at 402) is devoted to, the domestic telephone service. But even the small fraction of its business generated by its overseas system exceeds, in many relevant magnitudes, the totality of the businesses of the IRCs.

Thus, in 1974, AT&T handled 51,981,808 overseas telephone calls and collected overseas revenues of some $445,000,000. (*See* FCC, 1974 STATISTICS 29, 32)* This compares with the three petitioners' aggregate revenues in the same year of $287,705,137, a figure which would be increased by another $11,149,000 if the receipts of TRT, French Cable and United States-Liberia were added. (*Id.* at 189, 196) The petitioners' total revenues are thus about 1% of AT&T's. The principal switched service, telex, accounted for about half of their revenues in 1974 ($142,730,000), handling some 18.5 million outbound and 19.2 million inbound calls. (*Id.*)

The Order below contemplated the opening of what is essentially a new overseas record communications market: the transmission of alternate voice/record communications between the domestic public telephone network and overseas points. Neither AT&T nor the IRCs has heretofore provided the exact equivalent of such a service (except to Hawaii) (JA 10-11, 14)—AT&T because of the Commission's policy excluding the use of its facilities for overseas record communications (JA 10), and the IRCs because of the voice limitation on overseas DATEL and the

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* The petitioner has been advised that the FCC has not yet published telephone carriers' revenues for the year 1975.

difficulties caused by AT&T in reaching customers on the MTS (JA 95-97, 204-05, 410-12). There is every reason to believe, however, that, if telephone subscribers in the United States were provided with convenient access to appropriate overseas facilities, usage would build rapidly (JA 96-97, 338; see also JA 3).

It should be borne in mind that facsimile and high-speed data transmission are, for many purposes and uses, a superior alternative to telex.* (JA 229, 337-38, 347) The general availability of a switched analog circuit capability for handling overseas data will inevitably attract a significant share of the market now served by the IRCs' telex services. (JA 130, 229) Such capability may also substantially affect demand for the private line AVD services now supplied by the IRCs. (JA 76-77)** On the other hand, since AT&T does not now serve the overseas data communications market, none of its existing services would

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* By way of illustration, as indicated above (at p. 16, *supra*), most telex systems, which employ narrowband circuits, transmit at about 66 words per minute. Xerox Corporation's "telecopier" model 400-1, a standard desk-top office model, transmits, by facsimile techniques, a letter-sized 8″ x 11½″ sheet in four minutes. Such a sheet can contain 600 to 700 words of conventional single-spaced typewritten text—the equivalent of a transmission rate of over 150 words per minute—or holographic material or other forms of non-standard graphic display.

** All this will be occurring in the context of other market trends increasingly advantageous to AT&T. AT&T projects a 400% increase, from 1973 to 1980, in the annual number of overseas calls through the MTS (see JA 155-56), a growth which far exceeds the expected rise in international record communications. (JA 334) In 1960, the IRCs enjoyed approximately 64% of the total overseas telecommunications market. By 1972, that share had declined to about 40%. (See JA 192) By 1985, the U.S. Department of Commerce estimates that the IRCs will account for less than one-third of all international telecommunications revenue. See U.S. DEP'T OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1976, at 311 (1976).

be adversely impacted. Furthermore, revenue from overseas data calls is not essential to the viability of AT&T.*

C. *The Proceedings Below*

The Notice of Inquiry which initiated this Docket in July 1972 followed a year of informal deliberations which Intervenor Xerox Corporation ("Xerox") had initiated with a letter to the Commission in June 1971 (JA 442-44). Xerox, a manufacturer of end-line equipment used for facsimile transmission (JA 28), expressed the view that its customers should be able to use this type of equipment to overseas points (JA 443-44).

The Commission circulated Xerox's letter to petitioners and to AT&T for comment in July 1971. AT&T responded with the suggestion that the Commission eliminate the existing restrictions on the use of its overseas telephone circuits for the transmission of record traffic. Petitioners RCA Globcom and WUI submitted statements in which they pointed out that they could only properly serve the public need by obtaining "access to the domestic telephone network." (JA 10-11)

They and petitioner ITT Worldcom invited attention to the policies of *TAT-4*, which dictated that the IRCs provide the mixed record/voice service contemplated by the Commission and that AT&T not be authorized to do so. They suggested that AT&T and the IRCs should promptly negotiate, failing which the Commission should direct, appropriate circuit interconnections so as to afford U.S. telephone subscribers a meaningful overseas data transmission capability.** (JA 11)

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* Indeed, AT&T projects that less than 2% of its overseas revenues will be generated by overseas data calls. (JA 155)

** Such interconnections between the long-line facilities of AT&T and of other independent carriers were then, and are now, the means by which telephone subscribers in the contiguous 48 States and the District of Columbia may transmit data and facsimile to Hawaii, Alaska, and throughout Canada.

1. The Notice of Inquiry

The Notice of Inquiry solicited from petitioners, from AT&T, and from eleven other American carriers and trade associations (JA 16), views on 19 identified "matters," of which the most significant were:

> "(d) Whether the restrictions set forth in the facility authorizations issued to AT&T and in the message toll telephone tariffs of AT&T implementing such authorizations should be removed to permit use of the public switched telephone network for the overseas transmission of data and facsimile alternately with voice communications; and * * *
>
> "(e) Whether the international record carriers should be authorized to provide overseas dataphone or an equivalent service; * * *" (JA 14)

The Notice precipitated a dispute in which two opposing points of view, that of petitioners and that of AT&T, were readily identifiable. It provided, nevertheless, for only the most perfunctory notice-and-comment procedures. It invited the 15 entities to whom it was explicitly addressed (and anyone else who was interested) to file, in "an original and fourteen copies", "written comments on or before the 60th day after release of this notice and reply comments on or before the 90th day after release of this Notice". (JA 15-16)

The Commission received its first set of submissions in January 1973 and the second about a month later. There matters stood until late 1975 when the petitioners wrote to the Commission to advise it that its three-year old "record", such as it was, was largely obsolete. (JA 396-401, 406-29, 436-39) RCA Globcom and ITT Worldcom in particular urged that an opportunity be afforded to supplement the record with the submission of more timely data. (JA 400-01, 406-07, 436-37) (The Commission did not adopt these suggestions and expressly rejected them in

its final Order of January 19, 1976. (JA 9)) The Commission never released staff recommendations for critique by the parties. Nor did it issue any other interim statement reflecting consideration of the alternatives presented to it. (JA 438) In fact, it utilized none of the additional procedures available to it. It simply ruled; when it did, it did so entirely on the basis of its three-year old collection of "comments" (JA 2).

2. The Parties' Positions

The Commission's procedural format generated a record consisting largely of competing statements of position and plan. RCA Globcom, ITT Worldcom and WUI urged that they be designated to supply the public's need for the overseas switched voice/record services at issue (JA 92-93, 115, 131, 189, 201-03, 342, 388) and that AT&T should be required to provide telephone subscribers with convenient access to the IRCs' networks of overseas circuits by interconnection with the MTS. (JA 97-99, 102, 116-18, 207-10, 221, 250, 273-75)

The considerations which led the Commission in *TAT-4* to assign to the record carriers responsibility for the mixed private line service applied, in petitioners' view, with equal or greater force to the mixed switched service at issue in this proceeding. (JA 90-93, 193-201, 246, 262-70) AT&T, with its vast resources and unique access to the domestic MTS system, could overwhelm a market currently characterized by vigorous competition among several IRCs. (JA 84-86, 88-89, 92-93, 188-90, 198-99) And if AT&T, rather than the IRCs, were to dominate the facsimile and high-speed data substitutes for telex, the resulting losses could impair the IRCs' ability to provide record services generally. (JA 130, 190-91, 229-30)

The IRCs, RCA Globcom most elaborately (see JA 4), also pointed out an additional reason for selecting them. Drawing on their expertise as record communicators, they

were prepared to offer, in addition to the basic service at issue, optional and more comprehensive service features not proposed by AT&T. (See JA 97-98, 207-20, 300-01) In the words of the Commission's Report:

> "Such specialized features, as outlined in RCA's comments to this inquiry, are code conversion, multi-address capability, camp-on capability, overseas conditioned channels, deferred data mode, speed conversion and other individualized features that AT&T has not proposed to offer." * (JA 4)

The IRCs proposed, as the Commission recognized, to offer their services at rates "comparable to those of AT&T for similar services," ** although they expected to tariff additional charges for the optional extras they could supply. (JA 5, 99, 231)

AT&T's basic proposal was that the Commission lift the restrictions limiting its use of its overseas telephone

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* The Commission's Report provides, in ¶ 6 (JA 4), a capsule description of each of these specialized options except "overseas conditioned channels." The latter term refers to procedures for eliminating or limiting the background circuit "noise" which most people occasionally encounter in using the telephone and which occurs somewhat more frequently in overseas transmissions. Minor amounts of "noise" do not impair a circuit's utility for relaying speech; they nevertheless create or reflect some random input to a circuit which can have a substantial adverse effect on the accuracy of a data transmission or the fidelity of a facsimile transmission. *See* J. MARTIN, INTRODUCTION TO TELEPROCESSING 33-35, 56-58 (1972).

** Under the interconnect procedures proposed by the IRCs, AT&T, as the supplier of the domestic "haul", would share in the tolls for overseas data and facsimile calls in accordance with standards approved by or directed by the Commission. (JA 200-01, 296, 344, 376, 388) *See* Communications Act § 201, 47 U.S.C. § 201 (1970). The IRCs and Western Union divide in this fashion tolls for telex calls routed from the "hinterland" to overseas points through the existing interconnections of Western Union's circuits with those of the IRCs. See *Western Union Tel. Co.*, 30 F.C.C.2d 951 (1971).

system to voice traffic only. (JA 144-45) AT&T advanced, as an equity in favor of its approach, customer convenience. (JA 162-63) The same convenience could be provided, of course, by interconnections which would enable a telephone subscriber to place a switched record call through an IRC with the same ease with which he placed a conventional telephone call through AT&T's overseas circuits.*

D. *The Decision Below*

The Commission released its nine-page Report and Order (JA 1-9) "terminating" Docket No. 19558 (JA 9) on January 19, 1976. It

> "conclude[d] that it is no longer appropriate to restrict the use of overseas message telephone service to voice-only. * * * Accordingly, we are directing the Chief, Common Carrier Bureau, to accept applications from AT&T, pursuant to Section 214 of the Act, 47 U.S.C. §214, to add dataphone-type services to the category of service for which it may use its overseas facilities, as described herein." ** (JA 6-7)

The Commission also

> "f[ound] it to be in the public interest for the IRCs to expand their switched record services, such as Datel, and to interconnect their facilities with AT&T's domestic MTS network. * * * " (JA 7)

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* AT&T conceded that in the event the IRCs were authorized to provide the service at issue here, they could be interconnected with the domestic MTS system in order to do so (JA 162).

** Communications Act §214, 47 U.S.C. §214 (1970), *as amended,* (Supp. IV, 1974), requires a carrier to obtain from the Commission a certificate of convenience and necessity covering the construction or operation, or both, of a "line", a term referring to a "channel of communication established by the use of appropriate equipment. * * * "

To this end, the Commission undertook to

> "entertain pleadings from the international carriers regarding what facilities and interconnections, not presently provided, are necessary for their proposed services." (JA 8)

(These pleadings have since been filed, see PA 1-70,* and the proceedings disclose a continuing refusal by AT&T to afford domestic telephone subscribers the opportunity to access the IRCs' overseas analog circuits with the same ease with which they can reach AT&T's (PA 63-70). If AT&T has its way, telephone subscribers will thus have a powerful incentive to use AT&T's overseas circuits.)

The Commission's explanation of its decision focused on what it incorrectly characterized as the

> "substantial differences between the dataphone-type services proposed by AT&T and those services proposed by the IRCs." (JA 4)

It spoke of "the basic dataphone-type services", and it contrasted the "simpl[e] permi[ssion to] the customer to couple a data set * * * to his telephone" with the "more specialized IRC services" which would enable the "tailoring" of data services to customers' "individual requirements". (JA 4-5) The services "which we anticipate being offered by the IRCs are essentially an expansion of their present Datel and similar services * * *". (JA 5, n.8)

The Commission viewed its decision as

> "meeting an unmet need by giving added flexibility to the customer to use the international switched message telephone system for both voice and data, similar to their authorized use of the domestic telephone network". (JA 6)

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* Joint Addendum to Petitioners' Briefs, included at the end of the brief submitted by WUI in this proceeding.

The IRCs, which, in the Commission's view, "would appear to be unable to undercut AT&T's rates for basic dataphone-type services" (JA 5), were not entitled to "a protective umbrella to assure the IRCs a portion of the market" (JA 8).

The Commission held "the *TAT-4* rationale" to be inapplicable to this proceeding since the situations in the earlier case and this are not "fully parallel". *TAT-4* involved, in the Commission's view, "an essentially new service, AVD", while

> "we are faced here with different proposed services, meeting different subscriber needs, and for which different levels of investment will be required by the carriers". (JA 6)

The Commission acknowledged that "the IRCs may suffer some losses as a result of removing the restriction on the use of the overseas MTS network", but thought their fears of a substantial adverse effect on their record services to be unwarranted. (JA 7) As will be more thoroughly explored herein (at pp. 37-43, *infra*), the Commission's thinking on this point was unsupported by economic analysis or rationale.

ARGUMENT

POINT I

The Commission Rendered an Arbitrary and Capricious Decision by Failing to Comprehend and to Properly Consider Petitioners' Offer of a Service Fully Equivalent to AT&T's Proposal.

Putting to one side some comments of The Western Union Telegraph Company, the domestic telegraph carrier (JA 171-74), there was no dispute below—and none now—that subscribers to the domestic MTS should have the capability of placing and receiving data, facsimile, and related record calls to overseas points.* (JA 2) The central question before the Commission was not *whether,* but *how* and by *whom,* this overseas capability should be supplied.

The Commission's fundamental decision was to allow AT&T to be the principal provider of the overseas haul for overseas record calls originating on the domestic MTS system. This decision is arbitrary, capricious, and, as a result, subject to reversal because it is quite plainly based on the Commission's misreading of the service alternatives which AT&T and the petitioners presented to it. As a result, the Commission has not weighed, in light of the standards of the Communications Act and the public interest, the alternatives actually presented to it.**

The Commission's opinion is premised on the mistaken notion, unsupported in the record, that AT&T and the

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* Western Union, like RCA Globcom and the other petitioners, foresees a substantial adverse impact on overseas telex service as a consequence of this enhanced capability of the telephone system. (JA 309-10, 312-13).

** We consider in Point IV (pp. 43, 49, *infra*), the procedural defects of the Commission's Order. It suffices to note at this point that a proper hearing would undoubtedly have assisted the Commission in comprehending the petitioners' proposals.

IRCs offered two different services which, by and large, were mutually exclusive—an economy coach version proffered by AT&T and a limited, *de luxe* service, at club car rates, tendered by the IRCs.

"[T]here are," says the Commission's opinion,

> "* * * substantial differences between the data-phone-type services proposed by AT&T and those services proposed by the IRCs. Basically, AT&T's service as proposed would simply permit the customer to couple a data set, facsimile, or other equipment to his telephone (this equipment could be provided by the customer or by AT&T) and utilize Bell's existing switched telephone network. * * * On the other hand, the record carriers propose to offer features significantly different from those of AT&T. Such specialized features, as outlined in RCA's comments to this inquiry, are code conversion, multi-address capability, camp-on capability, overseas conditioned channels, deferred data mode, speed conversion and other individualized features that AT&T has not proposed to offer. * * * While the more specialized IRC services would apparently be priced higher than AT&T's offering, the IRCs' customers could secure any or all of the specific features outlined above, thereby tailoring the service to their individual requirements and could, if appropriate, utilize services of both the IRCs and AT&T. Those who have no requirement for these specialized features and who find the capabilities of the existing AT&T switched telephone network sufficient for their needs would then utilize AT&T's basic service at a lower cost." (JA 4-5)

In addition, wrote the Commission,

> "[W]e anticipate that AT&T and the IRCs will offer different types of services and * * * that the different services * * * will meet different public needs." (JA 7)

From this supposed dichotomy the Commission derived a vision of public benefit which it thought would flow from the elimination of its long-standing limitation of AT&T's international overseas telephone system to voice traffic.

> —"[U]sers of AT&T's proposed service would access its MTS network more easily than the IRCs' systems * * *." (JA 5)
>
> —The decision below is "meeting" an "unmet need by giving the added flexibility to the customer to use the international switched message telephone system for both voice and data * * *." (JA 6)
>
> —Customers with no need for the specialized features proposed by the IRCs "would then utilize AT&T's basic service at a lower cost." (JA 4-5)
>
> —"[T]he present inquiry clearly indicates an existing or latent public demand for both the type of service which AT&T proposes and the more specialized services outlined by the IRCs." (JA 8)

On the basis of this dichotomy, the Commission also dismissed the impact which its opening of the overseas record market to AT&T would have on the far smaller IRCs.

> —"If the IRCs cannot effectively compete with dataphone-type uses of MTS, consistent with this Order * * * we shall not impose a protective umbrella to assure the IRCs a portion of the market." (JA 8)

The foundation stone of this analysis—the Commission's apparent belief that the IRCs did not offer and seek a system which would afford telephone subscribers an overseas data transmission service as simple, convenient, and relatively inexpensive as that proposed by AT&T—has no basis in the record.

The key to the IRCs' proposals below was their request for a Commission Order requiring an interconnection be-

tween the circuitry of the domestic MTS system and the IRCs' networks of overseas circuits. The IRCs did not seek, as the Commission seems to think, some marginal improvement in access to their facilities so as "to expand their switched record services, such as Datel". (JA 7) Rather, they asked for full interconnection. Had it been ordered, such interconnection would have enabled the IRCs to provide, through a combination of domestic haul on the MTS and their own overseas haul, a complete equivalent of AT&T's service offering. (JA 99, 102, 116-19, 207-10, 218-21, 296, 344, 388)*

The specialized features which RCA Globcom outlined, *e.g.,* service with multi-address capability, were not proposed as a compulsory, higher-priced substitute for a service which, in the Commission's words, "would simply permit the customer to couple a data set, facsimile, or other equipment to his telephone" (JA 4). Rather, RCA Globcom made a more comprehensive proposal, with an optional supplement to the "basic" service at issue, which the IRCs could make available to those who needed or desired it and which warranted the IRCs' selection to provide the "basic" service as well. "[T]he more specialized services • • • would require", as the IRCs pointed out and the Commission's Report noted, "additional investment and thus higher rates." (JA 5) But, as the IRCs also pointed out, albeit not in the context of the dissimilar offerings

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* Indeed, AT&T inadvertently described this equivalence quite succinctly:

> "If the record carriers provide [overseas message data] service, they will provide the overseas channel portion of the service, and in addition the arrangement to connect those channels with the public switched network. The voice carriers will provide the connecting public switched network. The channel facilities used in either case will be essentially the same, although the record carriers may specially condition for data transmission the channels they use, and both the voice and record carriers may be presumed to have the experience and competence to provide the service." (JA 162)

envisioned by the Commission, "their rates * * * will be comparable to those of AT&T for similar services". (JA 5)

The Commission's choice of AT&T to provide, through its international MTS system, "basic" data transmission service to overseas points, and its decision to remit the IRCs to the rendition of specialized services, must be set aside. The Commission did not make a reasoned choice between the alternatives which the petitioners and AT&T actually presented to it, but a choice between AT&T's offering and one which the Commission erroneously hypothesized for the IRCs.

The present case parallels, in its essential particulars, the notable decision of the Court of Appeals for the District of Columbia Circuit in *Saginaw Broadcasting Co.* v. *FCC*, 96 F.2d 554 (D.C. Cir.), *cert. denied*, 305 U.S. 613 (1938). There the Commission chose between two applicants for a radio station construction permit in Saginaw, Michigan and gave great weight to the contestants' proposed hours of operation. The Court reversed and remanded upon a showing that the Commission had misconstrued the unsuccessful applicant's contemplated schedule of broadcasting.

> "In determining whether the public convenience, interest, or necessity would be served, proposed schedules of operation are an important factor. If, as we cannot but conclude in view of the statement, the Commission weighed the merits of the schedules proposed by the appellant and the intervenor with an erroneous conception of those schedules, the error was prejudicial." (*Id.* at 562)

The ruling in that case was, and an analogous reversal in this proceeding would be, an application of a familiar principle of administrative law. A reviewing court must "set aside agency action, findings, and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law * * *." *See* 5 U.S.C. § 706(2)(A) (1970).

The "core" of this concept is "the notion of rationality." *Columbia Broadcasting System, Inc.* v. *FCC,* 454 F.2d 1018, 1028 n. 66 (D.C. Cir. 1971). An agency ruling which fails to articulate, in the terms of the record before it, a reasoned basis of decision cannot stand. As the Supreme Court wrote in *SEC* v. *Chenery Corp.,* 318 U.S. 80, 94 (1943):

> "* * * [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."

An agency may not mischaracterize undisputed facts in the record before it and then make conclusions based on that mischaracterization. *See Temple University* v. *Associated Hospital Services,* 361 F.Supp. 263, 274 (E.D. Pa. 1973) (finding of facts by agency based only on incorrect interpretation of document by witness is "arbitrary and must be set aside"); *cf. International Parts Corp.* v. *FTC,* 133 F.2d 883, 885-86 (7th Cir. 1943).

Here the disclosed foundation of the Commission's judgment—a choice between false alternatives—has no basis in the record. The Commission has not assessed the IRCs' offers to provide the public, through interconnection, with service which was not different from, but better and more flexible than, the service offered by AT&T. (JA 218-20, 300-01) As a result, neither the interests of the public nor those of the IRCs have received the reasoned consideration to which they are entitled.

POINT II

The Commission Has Arbitrarily and Capriciously Abandoned Its Prior Policy Without Articulating an Adequate Rationale

The Commission's Report and Order effects a drastic change in the policies which heretofore have governed the roles of AT&T and petitioners (and the other IRCs) in the provision of overseas communications services. The Commission's decision lifts a long-standing "restrict[ion of] the use of overseas message telephone service to voice-only". (JA 6) And it opens the way, for the first time, to AT&T's general provision of overseas record services which the far smaller IRCs are fully equipped to supply.

The judgments of the Commission in these respects are arbitrary and capricious because it has failed to explain adequately and to justify this sharp veer in its regulatory course. Administrative law's bedrock requirement of reasoned decision, reflected in 5 U.S.C. § 706 (1970), should be applied with particular rigor when, as here, an agency has deviated from a policy articulated in previous rulings.

The Court of Appeals for the District of Columbia Circuit expressed the controlling considerations, as follows, in *Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971):

> "Lodged deep within the bureaucratic heart of administrative procedure * * * is the equally essential proposition that, when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law. Moreover, as this court has emphasized, the Commission 'must explain its reasons and do more than enumerate factual differences, if any, between * * * [similar] cases; it must

explain the relevance of those differences to the purposes of the Federal Communications Act.'"

See also Secretary of Agriculture v. *United States*, 347 U.S. 645, 653-54 (1954); *Garrett* v. *FCC*, 513 F.2d 1056, 1060-61 (D.C. Cir. 1975); *FTC* v. *Crowther*, 430 F.2d 510, 514 (D.C. Cir. 1970); *cf. Rayonier, Inc.* v. *NLRB*, 380 F.2d 187, 189 (5th Cir. 1967).

A. *The Decision in and Policy of TAT-4*

The Commission spelled out and explained its prior policy not to authorize AT&T to provide record services to foreign overseas points, in its so-called *TAT-4* Decision, *American Tel. & Tel. Co.*, 37 F.C.C. 1151 (1964).

In that proceeding AT&T sought authority to lease to all users alternate voice/data ("AVD") channels to overseas points. Such service is the private-line version of the switched services at issue in this Docket. AT&T offered to interconnect its domestic circuits with those of the IRCs so that the latter could, likewise, provide leased AVD service to overseas points. (*Id.* at 1152) The IRCs objected, urging that they alone be authorized to provide this overseas record service. *(Ibid.)*

The Commission ruled in their favor, saying:

"The record carriers express the understandable concern that AT&T, with its vast nationwide domestic network and its large sales force, is in a position to obtain the lion's share, if not all, of the business generated by this new service. The international record carriers are confined to doing business, for the most part, to the three so-called 'gateway' cities of New York, San Francisco, and Washington, D.C. • • •

"The use by customers of leased circuits for alternate voice-record use is, with the exception of the defense agencies, a new service. It is in its infancy, and we

> do not feel that we should jeopardize the opportunity of the record carriers to provide such services by also allowing AT&T, with its huge resources, as compared with those of the record carriers, to compete with such carriers in providing the service. A realistic appraisal of the relative capabilities of AT&T and the record carriers to secure and maintain such business leads us to conclude that AT&T's entry into this service would seriously jeopardize the ability of the record carriers to obtain a meaningful share of the business. * * * Loss of the revenue derived from these record services would have an inconsequential impact on the overall revenue picture of the Bell System. * * *
>
> [A] significant loss in [the IRCs'] participation in the telegraph business could have a serious effect on the viability of the international telegraph industry as a whole. This is a risk the record carriers should not be called upon to take, particularly in view of the fact that a substantial portion of this business will be diverted from existing overseas services. *It is in the public interest that we assure the viability of the record carriers by protecting them from the losses they would inevitably suffer were AT&T permitted to provide this voice-record service.** These losses could affect their ability to continue to provide the still important oversea message telegraph service at anything approximating current rates." (*Id.* at 1158-59)**

The Commission has noted in other contexts, as well, the commercial impact of AT&T's enormous size and

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* Emphasis supplied in quotations, here and elsewhere throughout, unless otherwise indicated.

** As a limited exception to the Commission's ruling, AT&T was allowed to retain certain overseas AVD circuits then leased to the Department of Defense. (JA 5-6) It can hardly be argued, however, that such "grandfathering" weakens the precedential value of *TAT-4*.

unique access to the MTS. Thus, in *Domestic Communications—Satellite Facilities*, 35 F.C.C.2d 844, *modified*, 37 F.C.C.2d 184, *modified*, 38 F.C.C.2d 665 (1972), the Commission established policies for the entry of non-government entities into the field of domestic communications through space satellites. To insure a reasonable opportunity for the multiple entry of viable alternative carriers, the Commission limited AT&T's initial use of satellite circuitry to certain specified services.

The Commission explained the limitations which it had placed on AT&T as follows:

> "Of course, the incentive for competitive entry by financially responsible satellite system entrepreneurs to develop specialized markets must be meaningful and not just token. * * * [*W*]*e cannot ignore the effects upon achievement of our objectives that might result from AT&T's existing economic strength and dominance stemming from its multi-billion dollar terrestrial investments and operations and its permeating presence and influence in all domestic communications markets.*" (*Id.* at 847)*

See also *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C.2d 307, 328-29, *modified*, 22 F.C.C.2d 746 (1970), *aff'd sub nom. General Telephone Co.* v. *United States*,

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* Upon a request for reconsideration, reported at 38 F.C.C.2d 665 (1972), the Commission adhered, with only minor modifications, to its earlier restrictions on AT&T, saying:

> "We further believe this initial limitation to be well within our authority * * * and consonant with * * * the policies underlying the antitrust laws. For example, we have previously exercised similar authority in connection with the authorization of the TAT IV cable to enhance the potential for competition among international carriers (*American Telephone and Telegraph Company*, 37 F.C.C. 1151, 1158-1160 (1964))." (38 F.C.C.2d at 678)

449 F.2d 846 (5th Cir. 1971); *ITT Cable & Radio Inc.—Puerto Rico,* 5 F.C.C.2d 823 (1966).

B. *The Commission's Attempted Distinction of TAT-4*

The Report below does not explain why the Commission now considers the analysis of *TAT-4* invalid—if, indeed, it does (see JA 6). Rather it treats *TAT-4* as a virtual irrelevancy because, as the Commission puts it, "the situation" in *TAT-4* and this case are not "fully parallel" (JA 6).

The Commission's Report disposes of *TAT-4* as follows:

> "The TAT-4 case involved an essentially new service, AVD, in which the subscriber leases a voice grade private line which he may use for both voice and record communications. Unlike the present situation, we found therein that both the IRCs and AT&T could offer the service with essentially the same investment and that competitive considerations dictated the authorization of only the IRCs to operate facilities in connection with that service. The instant inquiry involves the potential removal of a restriction which, in the case of AT&T, precludes use of the existing switched telephone network for a service which requires little or no additional investment by the carrier. The IRCs, by contrast, would incur some additional investment but have indicated that they will offer a more specialized service, capable of being tailored to the needs of the subscriber. Therefore, unlike the TAT-4 situation, we are faced here with different proposed services, meeting different subscriber needs, and for which different levels of investment will be required by the carriers." (JA 6)

The Commission's attempts to "distinguish"—and thus to mask an unreasoned abandonment of—*TAT-4* are demonstrably unsound. They depend fundamentally upon

the error already explored at length in the preceding point of this brief—the Commission's apparent belief that "we are faced here with different proposed services meeting different subscriber needs * * *" (JA 6).

The Commission's other alleged points of distinction are not points of distinction at all. "The *TAT-4* case involved," says the Commission, "an essentially new service * * *." But so does this one, for, as the Commission also wrote below, "[T]he overriding consideration in this inquiry is meeting an unmet need * * *" (JA 6). The fact that AT&T can exercise the new authority granted it by using existing facilities also fails to distinguish *TAT-4*. In the earlier proceeding, AT&T sought, and was denied, authority to provide private line AVD service through its existing trans-Atlantic cables, as well as the new one which then was being considered. 37 F.C.C. at 1152.

The matter of investment in new facilities is the final factor which, in the Commission's current view, distinguishes *TAT-4* from the present case. The *TAT-4* Commission was not, however, concerned, as the current Commission panel suggests it was, with investment by the IRCs, but, rather, with the physical availability of circuits to the IRCs. It then commented:

> "The international record carriers have already been granted authorization to acquire circuits in existing cable systems by means of indefeasible right of user, and they will obtain circuits in the new cable by such means, or by outright ownership, when such cable is installed. Thus they will have ample facilities for their use in providing these services with the required quality, speed, and reliability of transmission." (37 F.C.C. at 1160)

No question has been raised in the current proceeding concerning the adequacy of the facilities which the petitioners can bring to bear to meet the nation's needs for a

switched voice/data service to overseas points. All that is missing, thanks to AT&T's intransigence, is an effective interconnection between the domestic circuits of AT&T and the overseas circuits of the IRCs.* Instead of authorizing AT&T's invasion of the overseas record communications business, the Commission could have required such an interconnection, see Communications Act § 201, 47 U.S.C. § 201 (1970). And, by the reasoning of *TAT-4*, which the Commission has not invalidated, it should have.

C. *The Insufficiency of the Commission's Dismissal of TAT-4*

The Commission reached in this case a result diametrically opposite from the one indicated by *TAT-4*. Despite the Commission's labored efforts to "distinguish" *TAT-4*, it is plain that it has eliminated the authority of that decision by naked fiat. A result of this character cannot be sustained.

As the Court of Appeals for the District of Columbia Circuit noted in *FTC* v. *Crowther*, *supra*, in reversing an FTC decision in which that Commission had inadequately distinguished one of its previous rulings:

> "[I]t is not enough to explain the Commission's changed feeling by merely asserting that it has struck a new balance. Rationality in administrative adjudication requires something more than that." (430 F.2d at 516)

And in *Columbia Broadcasting System, Inc.* v. *FCC*, *supra*, a case involving the Commission's "equal time" doctrine in broadcasting, the Court said:

> "Faced with two facially conflicting decisions, the Commission was duty bound to justify their coexis-

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* See *Bell System Tariff Offerings*, 46 F.C.C.2d 413, *aff'd sub nom. Bell Telephone Co.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975), in which the Commission found a similar obstructionism on the part of AT&T *vis-a-vis* specialized domestic carriers.

tence. The Commission's utter failure to come to grips with this problem constitutes an inexcusable departure from the essential requirement of reasoned decision making. • • •

"• • • Unable to articulate reasons for overruling or distinguishing *Hays*, the Commission effectively ignored its own obvious precedent. Under the circumstances, its arbitrary action may not stand." (454 F.2d at 1027)

This Court has been equally demanding in its oversight of the regulatory process. In *Marco Sales Co. v. FTC*, 453 F.2d 1 (2d Cir. 1971), this Court reversed an order of the Federal Trade Commission, explaining that:

"The arbitrary character of the Commission's action here consists of its total failure to even advert to, much less explain, its reason for the rigid ad hoc adjudicatory stance it adopted toward the petitioner and the flexible tolerance its industry regulation displayed to those utilizing the same or similar devices. • • • 'There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case.'" (*Id.* at 6-7)

See also International Union (UAW) v. *NLRB*, 459 F.2d 1329, 1341 (D.C. Cir. 1972) ("an agency must either conform to its own precedents or explain its departure from them"); *Friends of the Earth* v. *FCC*, 449 F.2d 1164 (D.C. Cir. 1971); *Melody Music, Inc.* v. *FCC*, 345 F.2d 730 (D.C. Cir. 1965).

POINT III

The Commission's Order Is Impeached by the Report's Failure to Consider Relevant Antitrust Policies

A third reversible defect in the Commission's Report and Order is its failure to give adequate consideration to relevant antitrust policies. Those policies are an element, and a major one, of the "public interest" which any regulatory agency must seek out and enforce. *See FPC* v. *Conway Corp.*, 96 S. Ct. 1999 (1976); *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 759-60 (1973); *FMC* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *City of Huntingburg* v. *FPC*, 498 F.2d 778, 783 (D.C. Cir. 1974); *cf. FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953).*

Neither the Commission's authority to license market entry, nor its continuing supervisory jurisdiction of regulated carriers, strips the Commission of its imperative duty to be aware of, and to make affirmative decisions about, the effect of its rulings upon the structure and competitive climate of the industry it regulates.** *FCC* v. *RCA*

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* See also Communications Act § 313(a), 47 U.S.C. § 313(a) (1970), which provides in pertinent part:

> "All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts or agreements in restraint of trade are declared to be applicable * * * to interstate or foreign radio communications."

** As the Department of Justice recently observed in its comments submitted in *Application of Satellite Business Systems*, FCC File 7-DSS-P-76,

> "[N]o serious commentator has suggested that, given the resources available to the Commission and the scope of its responsibilities, complete reliance ought to be placed on its powers to rectify undesirable developments after they have occurred." (Memorandum of June 1, 1976 at p. 4.)

This seems especially true when the proposed subject of such deferred future regulation are operations with the range and inertial mass of AT&T's.

Communications, Inc., supra, 346 U.S. at 94-97. *See also McLean Trucking Co.* v. *United States,* 321 U.S. 67, 86-88 (1944).

A. *The Issues Ignored*

Here, we submit, the Commission has not addressed a significant antitrust issue which the IRCs presented to it—the threatened domination of the entire overseas record industry by one carrier, *viz.* AT&T, if it is authorized to exploit in the overseas record field the extraordinary marketing advantages conferred by its monopoly control of that unique, Government franchised distribution medium, the message telephone service. (JA 84-86, 88-89, 92-93, 130, 188-92, 197-201, 229-30, 267-70, 293-94, 335-38, 341-42)

With its privileged access to the domestic MTS system AT&T will have an overwhelming advantage over the IRCs in the quest for the overseas transmission of switched record traffic. (JA 84-86, 88-89, 188-90, 198-99, 293) Again by reason of its privileged access to the MTS, AT&T will be able to divert much of the traffic which now sustains the IRCs' telex and private line AVD services. (JA 130, 190-91, 229-30) Given the IRCs' present lack of effective access to the MTS, these are the mainstays of the IRCs' current business. The resultant substantial losses pose a threat to the viability and competitive vitality of the entire record service. *See American Tel. & Tel. Co., supra,* 37 F.C.C. at 1158-59.

These predictable consequences of the Commission's Order will not serve the goals of the antitrust laws, or the public's related interest in having available a full complement of overseas record services "with adequate facilities at reasonable prices", see Communications Act § 1, 47 U.S.C. § 151 (1970).* As the Supreme Court wrote in *United States* v. *Griffith,* 334 U.S. 100, 107-08 (1948):

* It is worth recalling the peril to which the Commission's Order has casually exposed the overseas record industry and which

"[T]he use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.

• • •

"• • • If monopoly power can be used to beget monopoly, the [Sherman] Act becomes a feeble instrument indeed."

B. *The Commission's Analysis*

An agency may not brush off issues of anti-competitive effect with conclusory *ipse dixit*. *See City of Huntingburg* v. *FPC, supra,* 498 F.2d at 783. It must address the issues rationally with a correct understanding of the factual context. *See Pillai* v. *CAB,* 485 F.2d 1018 (D.C. Cir. 1973). It must seek fact, not supply supposition. *See United States* v. *CAB,* 511 F.2d 1315 (D.C.Cir. 1975).

Here the Commission has not evaluated; it has simply dismissed, on implausible, speculative grounds, the likely consequences of AT&T's expansion into the overseas record industry. It has refused to consider the probability that its decision has licensed the entry into the overseas record market of a giant with an unparalleled domestic distribution system which will come to dominate the whole (JA 130, 190-91, 229-30, 337-38, 341-42).

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confronted the domestic record industry a generation ago. It prompted the enactment of Communications Act § 222 so as to preclude "the establishment of a monopoly of all forms of wire communication in a company primarily interested in the development and expansion of the use of telephony. • • •" Report of the Federal Communications Commission on the Domestic Telegraph Industry, *Hearings on S. Res. 95 Before the Subcomm. on the Study of the Telegraph Industry of the Senate Comm. on Interstate Commerce,* 77th Cong., 1st Sess., pt. 2, Appendix, Exhibit 21, at 422 (1941). *See also* SENATE COMMITTEE ON INTERSTATE COMMERCE, STUDY OF TELEGRAPH INDUSTRY, S. REP. No. 769, 77th Cong., 1st Sess., 21 (1941).

The Report discounts, without discernible evidentiary basis, the contention that AT&T's entry will have a sharp impact on the IRCs' other services. In answer to this suggestion, the Report points only to the continued existence of domestic telex, TWX and private line services side-by-side with the domestic transmission of record traffic through the MTS. (JA 7) But nothing in the record supports this argument's implicit assertions (a) that the characteristics of the domestic market, dominated by Western Union with its telex and TWX monopoly, are similar to those of the competitive overseas market*; and (b) that the domestic record services available to the public through non-telephone carriers are a model worth copying.**

The Commission's views minimizing the significance of AT&T's entry into the overseas record field rest on the Commission's notion that its authorization to AT&T will "principally serve the occasional user who has insufficient traffic to subscribe to Telex or private line services". (JA 7) AT&T's entry—or the interconnection alternatives proposed by the IRCs and misunderstood by the Commission—would have, of course, the capability of meeting the

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* Moreover, many subscribers to Western Union's TWX and telex systems, especially those in the "hinterland", may subscribe primarily because Western Union's systems have, through interconnection with the IRCs' circuits, an overseas record capability now lacking through the MTS.

** The Commission's cavalier approach to the economic ramifications of its action below calls to mind Commissioner Hooks' qualms concerning the Commission's Report and Order in *Regulatory Policies Concerning Resale and Shared Use of Common Carrier*, FCC Dkt. No. 20097 (July 16, 1976):

> "I am uneasy because we reject the AT&T cost study (for which I hold no particular brief), but fail to support our conclusions with *our own* economic analysis. Even if the AT&T cost study is dead wrong, and I have no reason to suppose either way on that, the *FCC* is charged with protecting the public and we do not offer herein a scintila of economic data to buttress our own theorems of no economic impact to non-commercial subscribers or smaller carriers." (Concurring Statement of Commissioner Hooks)

needs of such users. But they have, as well, the capability of serving many other record communications needs of many other users who now are served by the IRCs. (JA 130, 190-91, 229, 337-38, 341-42) Indeed, the Computer and Business Equipment Manufacturers Association observed below that all sizes and types of customers would utilize the switched overseas voice/record service at issue (JA 75-79), not just the "occasional user" surmised by the Commission.

AT&T, moreover, controls the domestic MTS system, to which the IRCs must have access if they are to offer any kind of effective overseas data and facsimile services—even the limited ones which the Commission mistakenly thought the IRCs were offering to provide. Thus AT&T has the power, the incentive—and quite possibly the intent—to handicap its prospective rivals indefinitely by continuing to deny or delay interconnections by IRCs to the domestic MTS system.* The Commisson, in seeking to avoid imposing a "protective umbrella" for the benefit of the IRCs, will have acted only to hobble them if AT&T is permitted to enter the overseas record market under these conditions.

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* This fear is not novel speculation. The Department of Justice has pending a civil antitrust suit against AT&T in which it alleges, *inter alia*, that AT&T has attempted to prevent, restrict and eliminate competition from other telecommunications common carriers by obstructing and attempting to obstruct their interconnection with the Bell System. *United States* v. *American Tel. & Tel. Co.*, Civ. No. 74-1698 (D.D.C. filed Nov. 20, 1974).

In *Bell Systems Tariff Offerings*, 46 F.C.C.2d 413, *aff'd sub nom. Bell Telephone Co.* v. *FCC*, 503 F.2d 1250 (2d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975), the Commission found that AT&T and its affiliated Bell System companies had unreasonably denied or delayed the establishment of physical connections with specialized domestic carriers, and that AT&T had discriminated against these potential competitors in favor of its own Long Lines Department by denying them the interconnections which they needed to engage in authorized interstate services. See also *Carterfone*, 13 F.C.C.2d 420 (1968); *ITT World Communications, Inc.* v. *New York Telephone Co.*, 381 F.Supp. 113 (S.D.N.Y. 1974).

C. *Inadequacy of the Commission's Analysis*

The Commission's address, such as it was, to the competitive issues which the record posed does not meet the standards of the cases.

Thus, in *United States* v. *CAB, supra,* the Court set aside the CAB's approval of service reduction agreements which three airlines entered during the "oil embargo" of late 1973 holding that the Board had made an insufficient showing of transportation need or public benefit to justify the approval of this type of anticompetitive agreement:

> "With competitive and noncompetitive solutions available, and no evidence to support the choice of either, the Board reacted quickly * * *: it chose the noncompetitive solution. * * *
>
> "The Board's original action was not a principled choice of alternatives based on evidence * * *." (511 F.2d at 1327)

Similarly, in *Pillai* v. *CAB, supra,* the Court vacated the CAB's approval of a multilateral international rate agreement because of the agency's failure to consider the less anticompetitive alternative of bilateral rate agreements. The Court said:

> "We stress we are not second-guessing the CAB on its choice of alternative courses of action. Rather, our concern has been that the CAB has not made the first guess—has not made a considered evaluation of the presently available alternatives * * *." (485 F.2d at 1029)

Here, too, the Commission "has not made the first guess" because of its incorrect assumptions that the IRCs and AT&T were proposing different services and that AT&T's overseas voice/data offering would primarily serve the "occasional user" who would not have used the IRCs'

services in the absence of AT&T's service. The Commission's casual treatment of the antitrust issues and facts relating to those issues is a fatal defect which requires reversal.

POINT IV

The Commission's "Notice-and-Comment" Procedure Was Insufficient to Create an Adequate Basis for the Commission's Judgment

The substantive defects so evident in the Commission's Report are the bitter fruit of a deficient hearing procedure which failed to comport with the requirements of the Communications Act and of the Administrative Procedure Act. That procedure represents an independently sufficient ground for vacating the decision below, see 5 U.S.C. § 706 (2)(D) (1970).

The Commission undertook in its Report to adjudicate an obvious contest between a small and readily identifiable group of parties, *viz.*, the petitioners and AT&T, for the right to provide the overseas carriage of record transmissions originating and terminating in the domestic MTS. (JA 2-3) The Commission's decision awarding the lion's share of this emerging record market to AT&T* presages a drastic upheaval in the established operational patterns and commercial structures of America's international telecommunications industry. (JA 84-86, 92-93, 130, 188-92, 197-201, 229-30, 267-70, 293-94, 335-38, 341-42) Yet the Commission went to judgment using only

* The IRCs' capacity to provide to domestic telephone subscribers even the "specialized" record services contemplated by the Commission's Report depends upon the provision of substantially improved interconnections between the MTS and the facilities of the IRCs. (JA 207-21) AT&T has not, at this writing, provided such interconnections and is vigorously opposing before the Commission petitioners' proposals to this end. (PA 63-70)

the most perfunctory "notice-and-comment" procedures contemplated by the APA, see 5 U.S.C. § 553(c) (1970).

The "record" below, which the Joint Appendix reproduces in its entirety, consists only of (a) the written comments which the petitioners, AT&T, and others filed in late 1972 and early 1973 in response to the Commission's Notice of Inquiry of July 1972 (JA 17-395, 440-41); and (b) petitioners' rejected requests for an opportunity to update and supplement the limited and obsolete material upon which the Commission acted, and AT&T's responses thereto (JA 396-439). The Commission could not have received or done less and paid even lip service to the language of the APA.

The Commission's procedure and record may have been adequate for a preliminary reconnaissance to identify problems and positions. But once the initial filings disclosed, as they did, clashes of ultimate position and sharply variant factual appreciations of the questions before the Commission, the Commission owed the parties and the public a significantly greater effort than it made to develop a record which could serve as the basis for an informed agency judgment.* The Commission, in short,

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* The Commission has not always been so cavalier in its procedures. In *Prime Time—Notice of Oral Argument*, 41 F.C.C.2d 518, *aff'd*, 41 F.C.C.2d 770, *aff'd*, 41 F.C.C.2d 903 (1973), involving the possible modification of the Commission's television network "prime time access rule", the Commission stated that:

> "While the record in this proceeding contains enough material so that a decision could possibly be issued on the basis of it, the Commission believes that in certain areas additional information and argument would be helpful. • • •
>
> "• • • We call attention to two areas which we hope will be covered." (41 F.C.C.2d at 518-19).

Notwithstanding this effort by the Commission, this Court subsequently suggested that the Commission "might have done more" to seek out other views, *National Ass'n of Independent Television Producers & Distributors* v. *FCC*, 502 F.2d 249, 258 (2d Cir.), *modifying Prime Time Access Rule*, 44 F.C.C.2d 1081 (1974). This Court repeated its earlier admonition that "the role of the Commission 'does not permit it to act as an umpire blandly calling

was altogether too casual in its address to problems of substance.

It is, by now, well established that the Administrative Procedure Act does more than ordain two mutually exclusive modes of procedure—a full-dress, trial-type hearing for those matters imperatively covered by 5 U.S.C. §§ 556, 557 (1970), and a bare "write-me-a-letter" technique, used here, which will suffice in all other cases. Rather, an agency has an obligation to "realistically tailor the proceedings to fit the issues before it * * *". *City of Chicago* v. *FPC*, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).

As the Court of Appeals for the District of Columbia Circuit wrote in *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238, 1253-54 (D.C. Cir. 1973):

> "The APA may be viewed as providing the outer boundaries of administrative procedures. Congress has determined that the procedures outlined in section 553 will be the minimum protections upon which administrative action may be based, according to interested parties a simple notice and right to comment. At the opposite end of the spectrum lie the requirements of sections 556 and 557. Those may be viewed as representing the highest degree of administrative protection that Congress believed would be necessary to protect interested parties. There is no reason, however, to conclude that Congress in establishing these limits intended to preclude all the possible formulations that might lie in between the two extremes. To so hold would run directly counter to several opinions of this court that have approved or required procedures that contained elements of both

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balls and strikes for adversaries appearing before it. . . .'" (502 F.2d at 257, quoting *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966))

> section 553 and section 556 and 557 proceedings, but fully conform to neither."

See also Appalachian Power Co. v. *EPA*, 477 F.2d 495, 500-01 (4th Cir. 1973).

And, as the Court also noted in *Mobil Oil*, "[A]gencies are [not] granted *carte blanche* to proceed in any way they may see fit." (483 F.2d at 1254). Rather, the "purposes and provisions of the substantive statute being administered" should be "examined" to see whether "more than the comparatively feeble protections of section 553 of the APA may be called for." (*Ibid.*) "The kind of procedure required must take into account the kind of questions involved." *Walter Holm & Co.* v. *Hardin*, 449 F.2d 1009, 1015 (D.C. Cir. 1971) (requiring oral hearing instead of notice-and-comment procedure used by agency). This flexible approach, in which the procedure to be followed is a function of the problem viewed in the light of the statutory scheme has been applied in several cases. See, *e.g., Appalachian Power Co., supra*, 477 F.2d at 550-01; *Northern California Power Agency* v. *Morton*, 396 F. Supp. 1187 (D.D.C. 1975); *cf. Independent Bankers Ass'n* v. *Board of Governors*, 516 F.2d 1206, 1217-18 (D.C. Cir. 1975).

The Communications Act mandates just such flexibility in this case. Section 4(j) of the Act, 47 U.S.C. § 154(j) (1970), includes a general directive to the Commission to

> "conduct its proceedings in such manner *as will best conduce* to the proper dispatch of business and *to the ends of justice.*"

The Commission initiated its inquiry in this Docket pursuant to, *inter alia*, Sections 201 and 205, 47 U.S.C. §§ 201, 205 (1970). Section 201, of obvious relevance here, authorizes the Commission to direct interconnections between carriers "after opportunity for hearing", and Section 205 authorizes the Commission to prescribe charges, classifica-

tions, regulations or practices "after full opportunity for hearing." * These procedural directives derive their specific content in a particular case from the nature of the matter before the Commission for decision.

Here, it seems clear, the Commission should have permitted the parties to make—and, indeed, should itself have made—a more penetrating inquiry into several matters which the Commission or common sense, or both, suggest are material to an informed judgment about the major choices which confronted the Commission in this Docket.

A principal matter which should have received further attention below is the likely effect of the Commission's award to AT&T upon competitive conditions in international telecommunications and upon the petitioners' other services, notably overseas telex, and their capacity to render effectively to the public a full range of record services in the future. (JA 86, 92, 130, 188, 190-91, 229-30, 335-38) Whatever the precise meaning of the *TAT-4* Decision, that case did make at least one thing clear: the question of intermodal effect is an inquiry which must be central to *any* proposed expansion of AT&T into the field of overseas record services.

Here, the Commission expressed its "realiz[ation] that the IRCs may suffer some losses" as a result of its award

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* Section 205 is concerned primarily with the setting of rates for communications services. There are elements of such rate prescription in the present Report. The latter makes perfectly plain the Commission's view that AT&T shall make the same charges for overseas record calls through its circuits that it does for comparable telephone calls. (JA 5) The Commission issued this "hint" to AT&T without considering, so far as one can tell from the Report, whether AT&T will incur expenses "conditioning" its overseas circuits to insure their reliability for data transmission, which should not be charged to voice callers but only to the transmitters of data. (JA 5-6, 339-40) This Court has ruled that the Commission must comply with the provisions of Section 205 when rate-setting is the practical effect of its actions. See *American Tel. & Tel. Co.* v. *FCC*, 487 F.2d 865, 874-75 (2d Cir. 1973); *American Tel. & Tel. Co.* v. *FCC*, 449 F.2d 439 (2d Cir. 1971).

to AT&T (JA 7), but brushed aside the petitioners' expressed fears because "the IRCs have not justified their allegation that they would suffer a significant decline in Telex and AVD service". (JA 7) But how, in the Commission's format, the IRCs, or anyone else, could "justify" any debated assertion of complex fact involving predictions of market trends is neither explained nor explainable. If the Commission were not prepared to accept the IRCs' representations on this point, it should have so stated, pointed out its reasons for doubt, and afforded the IRCs an opportunity to document their concerns through expert testimony or other appropriate means.*

A full hearing is especially appropriate where substantial antitrust questions are raised. As the Court stated in *United States* v. *CAB, supra,* where the CAB had acted entirely on the basis of written comments:

> "[Antitrust] grounds are unusually 'complex, requiring painstaking assessment of many relevant considerations.' As a result, such 'issues are particularly suited to resolution by evidentiary hearing . . . disposition of antitrust questions by other means creates a greater likelihood of administrative error, and invites a more skeptical judicial scrutiny.'
>
> • • •
>
> "[Q]uestions as to probable competitive behavior and its probable effects are susceptible to determination

* Another indication of the inadequacy of the Commission's procedure is its failure to take into account the specialized services of "value-added" record carriers which might be piggybacked over AT&T's overseas circuits, should AT&T be authorized to provide overseas voice/record services. Value-added carriers essentially lease other carriers' circuits (usually AT&T's) and, by means of the network created thereby, resell enhanced record services to their own customers. See *Graphnet Systems, Inc.*, 44 F.C.C.2d 800 (1974). Such services might include procedures enabling users with dissimilar data transmission terminals to communicate (a service incorporating the speed and code conversion features of RCA Globcom's specialized service proposals herein (JA 212-13)).

> in the light of business and economist testimony and exhibits, and cross-examinations concerning analyses and underlying assumptions. Such matters are not to be determined exclusively by reasoning in the abstract, based upon logical speculation." (511 F.2d at 1324-25, 1326) (footnotes omitted)

The Commission, whether it liked it or not, had a difficult job on its hands. And it failed to do the work necessary. Instead, it delayed any action on the "comments" which it had accumulated in early 1973 for three years, and then, without more, decided. By every measure except the clock, the Commission rushed to judgment. It declined to recognize that the complexity—and significance to the parties and public—of the issues it faced demanded a significantly greater effort to get at the facts than it was willing to make. The decision flowing from such a casual procedure cannot lawfully be sustained.

CONCLUSION

The Commission's Report and Order reflects a fundamental misunderstanding of the choices before the Commission, an unjustified repudiation of the policies of *TAT-4*, and an indifference to the policies of the antitrust laws. The Report and Order are the product of a procedure too casual and incomplete to afford the petitioners and the public interest the hearing to which they were, and are, entitled by the Administrative Procedure Act and the Communications Act.

The Commission's Report and Order should be vacated and set aside and the case remanded to the Commission for such further proceedings as may be appropriate.

Respectfully submitted,

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Dated: July 30, 1976

STATUTORY APPENDIX

Statutory Appendix

Communications Act of 1934, Section 1, 47 U.S.C. § 151

§ 151. Purposes of chapter; Federal Communications Commission created.

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Communications Act of 1934, Section 3(b), 47 U.S.C. § 153 (b)

§ 153. Definitions.

For the purposes of this chapter, unless the context otherwise requires—

• • •

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

Statutory Appendix

Communications Act of 1934,
Section 4(j), 47 U.S.C. § 154(j)

§ 154. Federal Communications Commission.

* * *

(j) Conduct of proceedings; hearings.

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

Communications Act of 1934,
Section 201, 47 U.S.C. § 201

§ 201. Service and charges.

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided,* That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further,* That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further,* That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

Communications Act of 1934,
Section 202, 47 U.S.C. §202

§ 202. Discriminations and preferences.

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services

for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense.

Communications Act of 1934,
Section 205, 47 U.S.C. § 205

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations.

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed,

and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Communications Act of 1934,
Section 214, 47 U.S.C. § 214

§ 214. Extension of lines; certificate of public convenience and necessity; discontinuance of service.

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an inter-

state line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction,

or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or fa-

cilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

Communications Act of 1934,
Section 222, 47 U.S.C. § 222

§ 222. Consolidations and mergers of telegraph carriers.

(a) Definitions.

As used in this section—

(1) The term "consolidation or merger" includes the legal consolidation or merger of two or more corporations, and the acquisition by a corporation through purchase, lease, or in any other manner, of the whole or any part of the property, securities, facilities, services, or business of any other corporation or corporations, or of the control thereof, in exchange for its own securities, or otherwise.

(2) The term "domestic telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from domestic telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(3) The term "international telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(4) The term "consolidated or merged carrier" means any carrier by wire or radio which acquires or operates the properties and facilities unified and integrated by consolidation or merger.

(5) The term "domestic telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland and terminate or originate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland, and includes acceptance, transmission, reception, or delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into and points of designation within, the continental United States with respect to record communications by wire or radio which either originate or terminate outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, and also includes the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States: *Provided*, That nothing in this section shall prevent international telegraph carriers from accepting and delivering international telegraph messages in the cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States under regulations prescribed by the Commission, and the incidental transmission or reception of the same over its own or leased lines or circuits within the continental United States.

(6) The term "international telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, but does not include acceptance, transmission, reception, and delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into, and points of destination within, the continental United States with respect to such communications, or the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States.

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(b) Consolidation or merger authorized; acquisition of facilities.

(1) It shall be lawful, upon application to and approval by the Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger; and for any domestic telegraph carrier, as a part of any such consolidation or merger or thereafter, to acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any carrier which is not primarily a telegraph carrier: *Provided,* That, except as provided in paragraph (2) of this subsection, no domestic telegraph carrier shall effect a consolidation or merger with any international telegraph carrier, and no international telegraph carrier shall effect a consolidation or merger with any domestic telegraph carrier.

(2) As a part of any such consolidation or merger, or thereafter upon application to and approval by the Com-

mission as hereinafter provided, the consolidated or merged carrier may acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any international telegraph carrier.

(c) Application to Commission; public hearings; determination of public interest; approval; divestment of international operations.

(1) Whenever any consolidation or merger is proposed under subsection (b) of this section, the telegraph carrier or telegraph carriers seeking authority therefor shall submit an application to the Commission, and thereupon the Commission shall order a public hearing to be held with respect to such application and shall give reasonable notice thereof, in writing, and an opportunity to be heard, to the Governor of each of the States in which any of the physical property involved in such proposed consolidation or merger is situated, to the Secretary of State, the Secretary of Defense, the Attorney General of the United States, representatives of employees where represented by bargaining representatives known to the Commission, and to such other persons as the Commission may deem advisable. If, after such public hearing, the Commission finds that the proposed consolidation or merger, or an amended proposal for consolidation or merger, (1) is authorized by subsection (a) of this section, (2) conforms to all other applicable provisions of this section, (3) is in the public interest, the Commission shall enter an order approving and authorizing such consolidation or merger, and thereupon any law or laws making consolidations and mergers unlawful shall not apply to the proposed consolidation or merger. In finding whether any proposed consolidation or merger is in the public interest the Commission shall give due consideration, among other things, to the financial soundness of the carrier resulting from such consolidation or merger.

(2) Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission, after the consideration for the property to be divested is found by the Commission to be commensurate with its value, and as soon as the legal obligations, if any, of the carrier to be so divested will permit. The Commission shall require at the time of the approval of such consolidation or merger that any such party exercise due diligence in bringing about such divestment as promptly as it reasonably can.

(d) Alien ownership of capital stock.

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(e) Distribution of telegraph traffic among international carriers; contiguous foreign country defined; intervention of Commission; international and domestic operations construed.

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(f) Protection of employees.

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Communications Act of 1934,
Section 313(a), 47 U.S.C. § 313(a)

§ 313. Application of antitrust laws to manufacture, sale, and trade in radio apparatus.

(a) Revocation of licenses.

All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign

radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

Communications Act of 1934,
Section 402(a), 47 U.S.C. § 402(a)

§ 402. Judicial review of Commission's orders and decisions.

(a) Procedure.

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5.

Communications Act of 1934,
Section 403, 47 U.S.C. § 403

§ 403. Inquiry by Commission on its own motion.

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in

any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

Administrative Procedure Act,
Section 4, 5 U.S.C. § 553

§ 553. Rule making.

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a decription of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Administrative Procedure Act,
Section 7, 5 U.S.C. § 556

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating

employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and

to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Administrative Procedure Act,
Section 8, 5 U.S.C. § 557

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings un-

less there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including

initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Administrative Procedure Act,
Section 10(e), 5 U.S.C. § 706

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or other-

wise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ITT WORLD COMMUNICATIONS INC. RCA GLOBAL COMMUNICATIONS, INC., and WESTERN UNION INTERNATIONAL, INC., Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents. -and- AMERICAN TELEPHONE & TELEGRAPH COMPANY, XEROX CORPORATION, HAWAIIAN TELEPHONE COMPANY, AMERICAN PETROLEUM INSTITUTE, Intervenors.	:	Docket Nos. 76-4049 76-4061 76-4074

CERTIFICATE OF SERVICE

I hereby certify that I have caused the enclosed brief for Petitioner RCA Global Communications, Inc. to be served today upon the following by mailing two copies thereof, first-class mail, postage prepaid on this 30th day of July, 1976:

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